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No. 88-1282

In The

Supreme Court of the United States

October Term, 1988

BROWN-FORMAN CORPORATION,

Petitioner,

v.

TENNESSEE ALCOHOLIC BEVERAGE COMMISSION, et al.,

Respondents.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION OF RESPONDENT TENNESSEE ALCOHOLIC BEVERAGE COMMISSION

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QUESTION PRESENTED

Tennessee's contemporaneous price affirmation statute, Tenn. Code Ann. § 57-3-202(e), requires suppliers of alcoholic beverages to affirm that their prices, at the time of their sale to a Tennessee wholesaler, are no higher than the prices the suppliers are offering to wholesalers elsewhere at that time. Tennessee has no price posting requirement. Both before and after a supplier has made its sale to a Tennessee wholesaler, the supplier is free to raise or lower its prices, as it chooses, in wholesale liquor transactions in other states, without any regulatory approval by or prior notice to the Tennessee Alcoholic Beverage Commission. Tennessee's affirmation law defines the affirmed "price" to exclude any differentials in price to Tennessee wholesalers and non-Tennessee wholesalers resulting from differences in cost not directly related to the quality and proof of the product, or from equally offered discounts based upon quantity purchases.

Did the Sixth Circuit correctly conclude (1) that the State of Tennessee, in the exercise of its Twenty-first Amendment powers to regulate intoxicating liquors, may constitutionally insist on liquor prices to domestic wholesalers as low as prices offered elsewhere in the country, and (2) that § 57-3-202(e) does not violate the Commerce Clause of the United States Constitution, because it does not directly regulate or discriminate against interstate commerce?

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION OF RESPONDENT TENNESSEE ALCOHOLIC BEVERAGE COMMISSION

Respondent Tennessee Alcoholic Beverage Commission, its members and its director (hereinafter collectively referred to as "the Commission"), respectfully request this Court to deny Brown-Forman Corporation's petition for a writ of certiorari for review of the decision of the United States Court of Appeals for the Sixth Circuit in this case. That decision is reported as *Brown-Forman Corp.*

v. Tennessee Alcoholic Beverage Comm'n, 860 F.2d 1354 (6th Cir. 1988).

The Commission does not dispute petitioner's description of the Parties; Opinions Below; Jurisdiction; or the Constitutional Provisions and Statute, with the exception to its abbreviated citation to Tenn. Code Ann. § 57-3-202(e), which the Commission submits in full.

CONSTITUTIONAL PROVISIONS AND STATUTE

Tenn. Code Ann. § 57-3-202(e) provides as follows:

> (1) Every manufacturer, distiller, rectifier, factor, broker, or vintner of alcoholic spirituous beverages or vintage alcoholic beverages shall, before offering for sale to any licensed wholesaler or distributor in the state of Tennessee any brand of alcoholic spirituous beverage or vintage alcoholic beverages, file with the alcoholic beverage commission an affirmation of corporate policy with regard to sales of all brands owned, controlled, sold, offered for sale, franchised or distributed by such manufacturer, distiller, rectifier, factor, broker or vintner in this state;
>
> (2) The affirmation shall certify that the manufacturer, distiller, rectifier, factor, broker or vintner shall not willfully sell or offer for sale any alcoholic spirituous beverage or vintage alcoholic beverages of a particular brand, proof or size, in Tennessee at a price higher than the price such liquors are sold or offered for sale to licensed wholesalers in any other state in the United States.
>
> (3) "Price" as used in this subsection shall mean platform price at the distillery and shall not include price differentials based on transportation costs, containers or other costs not directly related to the quality and proof of the product concerned. Quantity

discount prices for liquors sold to monopoly states or elsewhere shall not be considered to be violation of the manufacturer's, distiller's, rectifier's, factor's, broker's, or vintner's affirmation if such discount prices are also offered to Tennessee wholesalers for purchases in the same quantities;

(4) Any person, firm or corporate official who makes a false statement in any affirmation filed hereunder shall be guilty of a misdemeanor and shall be punished by a fine of not more than one thousand dollars ($1,000) and by imprisonment for not more than six (6) months. Every affirmation filed hereunder shall be deemed to have been made in each county in Tennessee where alcoholic spirituous beverages or vintage alcoholic beverages are legally offered for sale;

(5) Any manufacturer, distiller, rectifier, factor, broker, or vintner, who fails to file such affirmation or willfully violates the pledges contained therein shall have its license and privileges to import and sell alcoholic spirituous beverages or vintage alcoholic beverages in the state refused, revoked or suspended by the alcoholic beverage commission for a period of not less than one (1) year;

(6) For the purpose of carrying out the provisions of this subsection, each licensed manufacturer, distiller, rectifier, factor, broker or vintner in the state of Tennessee offering for sale to any licensed wholesaler or distributor in the State of Tennessee any brand of alcoholic spirituous beverages or vintage alcoholic beverages shall file the affirmation as herein provided with the alcoholic beverage commission not later than sixty (60) days after May 13, 1975, and thereafter shall file the same in accordance with the provisions as contained in subsection (e)(1), and other pertinent statutes.

STATEMENT OF THE CASE

Brown-Forman Corporation (hereinafter "petitioner"), is a Tennessee corporation engaged in the importation, manufacture, sale and distribution of alcoholic beverages. It manufactures one of its brands in Tennessee and imports other brands into the state. It distributes those same brands in states other than Tennessee. (Rec. 6).[1]

Tennessee is one of several states that require alcoholic beverage price affirmation. The states engage in price affirmation in two ways. States which license the wholesale and retail sale of alcoholic beverages, such as Tennessee, address affirmation through statutory provisions. Other states, referred to as "monopoly" or "control" states, because they purchase all of the alcoholic beverages distributed and sold within their borders, utilize affirmation practices through their contracts with suppliers of alcoholic beverages. (Rec. 36, 114-15, 125-26, 130-36, 187).

Tennessee's affirmation statute, Tenn. Code Ann. § 57-3-202(e), was enacted in 1975. See 1975 Tenn. Pub. Acts, ch. 234. It is part of the comprehensive state statutory scheme regulating virtually all aspects of the manufacture, importation, distribution and sale of alcoholic beverages in the State of Tennessee. *See* Tenn. Code §§ 57-1-101 to -10-102. The purpose of this law is to

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[1] References to "Rec." refer to portions of the appellate record contained in the three volume Joint Appendix filed with the Sixth Circuit.

prevent petitioner and other suppliers of alcoholic beverages from discriminating in price in their sales to Tennessee wholesalers and wholesalers in other states for products of the same quality and proof. (Rec. 36).

On October 30, 1986, petitioner filed this declaratory judgment action against the Commission challenging the constitutionality of Tenn. Code Ann. § 57-3-202(e). (Rec. 6). Prior to initiating this lawsuit, petitioner withdrew the affirmation statement it had filed with the Commission. (Rec. 9-10). Before petitioner's withdrawal of its affirmation, there had been no violations of the state affirmation law. Accordingly, there have been no enforcement actions by the Commission. In addition, the Commission has not promulgated any interpretive rules or regulations with regard to this law. (Rec. 228-29).

In withdrawing its affirmation and in seeking a declaratory judgment, petitioner relied upon the decision of this Court in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986), which held that the State of New York's liquor price affirmation statute was facially unconstitutional. (Rec. 10). The New York law struck down in *Brown-Forman* was "prospective" in operation, requiring all distillers of alcoholic beverages to post a schedule, before the 25th day of each month, listing their wholesale prices in New York, to be effective the second following month. At the time the schedules were filed, the distillers were also required to file an affirmation that their posted prices for New York would be no higher than the lowest prices at which the distillers would sell liquor, during the effective month, to wholesalers in any other state. 476 U.S. at 575-76.

The *Brown-Forman* decision did not overrule the earlier holding of the Court in *Joseph E. Seagram and Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966), which upheld the facial constitutionality of New York's predecessor liquor affirmation law. That law was "retrospective" in operation, requiring suppliers to affirm that their prices to New York wholesalers were no higher than their wholesale prices in other states during the month immediately preceeding the suppliers sale in New York. 384 U.S. at 39-40.

Tennessee's affirmation statute is neither prospective nor retrospective in operation, but rather uses a "contemporaneous" time period as the reference point for the lowest or affirmed price. Tennessee's contemporaneous affirmation requirement means that a supplier must affirm that its prices to a domestic wholesaler are no higher than its prices elsewhere at the very time of the supplier's sale to a Tennessee wholesaler. (Rec. 38-39).

During the trial of this matter, petitioner presented evidence that, in the course of its business, it keeps records referred to as depletion flash reports. These reports are prepared based upon information supplied by the wholesalers and the control states about their sales of petitioner's products. The reports contain information, sorted by state and brand, of total sales and sales to date for petitioner's current and immediate past fiscal years. The reports also contain what is referred to as a quota number, which is the number of sales petitioner is seeking for each of its brands. Finally, the reports indicate the percentage of quota attained in sales to date. (Rec. 95-101; 330).

Petitioner contends that these depletion flash reports are an accurate reflection of demand for its various products. These reports show differing demands for certain of petitioner's products in certain states. (Rec. 104-05). The depletion flash reports are not based upon sales of petitioner's products per capita. (Rec. 141-42). Moreover, the depletion flash reports do not reflect the extent, or even the existence, of any discounting or promotional activities, which the wholesalers may be doing. It was acknowledged that these reports do not even indicate what causes an increase or decrease in sales of petitioner's products. (Rec. 200-01).

Tennessee's affirmation law requires that a supplier's "platform price at the distillery," at the time of its sale to a Tennessee wholesaler, be no higher than its platform price to wholesalers in other states at that time. (Rec. 35, 232-33). The definition of the affirmed "price" in § 57-3-202(e)(3) expressly provides that valid price variations can result from differences in transportation costs, container costs or any other costs not directly related to the quality and proof of the product. (Rec. 35, 149-50).

This law also specifically provides that variations in price can result from discounts based upon quantity purchases. (Rec. 35, 120). Petitioner acknowledged that, under this law, a Tennessee wholesaler would pay a higher price to a supplier than the price paid by a wholesaler in another state, where a quantity discount was offered by the supplier, and the out-of-state wholesaler took advantage of the discount, and the Tennessee wholesaler did not. (Rec. 169).

The definition of "price" in Tennessee's affirmation law contrasts dramatically with the definition of "price" in the New York affirmation law held unconstitutional in *Brown-Forman*. That law required all discounts or allowances offered to wholesalers in other states to be reflected in the New York affirmed price. (Rec. 166, 179). Some of the control states, in their contractual warranties, also require petitioner's price to the control state to reflect all discounts and allowances petitioner offers to wholesalers elsewhere. According to petitioner, the terms and conditions of the control state warranties are generally broader and more "onerous" that the state affirmation laws. (Rec. 132).

Petitioner claims that affirmation in Tennessee has resulted in millions of dollars in losses. Petitioner has not, however, quantified any monetary losses that affirmation in Tennessee has caused it. (Rec. 165). Petitioner is one of the two or three most profitable corporations in the alcoholic beverages industry, and has had gross revenues in excess of $1 billion, with an overall increase in sales of 12.2%. Petitioner is the third largest factor in the alcoholic beverages market, and with Seagrams and Allied-Lyons, controls a substantial share of this market. (Rec. 153-54, 164).

Petitioner is currently able to provide money to its wholesalers both within and without Tennessee, which is used for discounting its products, through its 77-17 promotional allowance program. (Rec. 172). Petitioner intends for the wholesalers to use these monies to promote its products. (Rec. 172). Although the promotional allowance that each wholesaler receives is not tied to the

amount either of the wholesaler's advertising or purchases of petitioner's products, the allowance is based upon the wholesaler's past purchases and projection of future purchases. (Rec. 157).

Petitioner was prohibited from offering its 77-17 promotional allowance to wholesalers in the State of New York, yet that state's affirmation statute required that the allowance offered to wholesalers in other states be reflected in the New York affirmed price. (Rec. 166-67). Petitioner is and has been providing its 77-17 promotional allowance to Tennessee wholesalers for quite some time. (Rec. 188). Petitioner's promotional allowance is not prohibited under Tennessee's affirmation law. (Rec. 232).

The testimony and records of petitioner's Off-Premises Manager for Wine in the states of Tennessee, Arkansas and Kentucky, reveal that information on the use of the promotional allowance is voluntarily provided by wholesalers as to each specific brand of petitioner's products they sell. (Rec. 259-61, 353). This information indicated that petitioner's 77-17 allowance was used by wholesalers to discount petitioner's products. (Rec. 287-89, 353).

The district court, relying primarily on the proof presented at trial that the demand for petitioner's products varies regionally, held that § 57-3-202(e) directly regulated interstate commerce in violation of the Commerce Clause, because the "practical effect" of the law was to control the prices of Brown-Forman's products in other states. (Rec. 322). The court further held that because the statute directly regulated interstate commerce, it could not be saved from invalidation by virtue

of the State's power to regulate intoxicating liquors under the Twenty-first Amendment to the United States Constitution. (Rec. 323).

On appeal, the Sixth Circuit reversed. *Brown-Forman Corp. v. Tennessee Alcoholic Beverage Comm'n*, 860 F.2d 1354 (6th Cir. 1988). In its review of § 57-3-202(e), the court acknowledged that the "price elasticity of demand for different types of liquor varies significantly in different parts of the country" and as such Tennessee's affirmation requirement of equally low prices could result in "distortions" in the interstate liquor market. The court noted, however, that:

> The evidence presented by Brown-Forman did not quantify the market distortions attributed to the Tennessee statute. In terms of dollars and cents, both the practical effect of the statute on Brown-Forman's bottom line and the practical effect of the statute on the pocketbooks of consumers within and without the state remains unknown.

860 F.2d at 1358. Moreover, the question, as framed by the Sixth Circuit, was not "whether Tennessee's liquor-pricing statute is likely to have 'repercussions' on liquor prices in other states, but whether Tennessee has actually undertaken to 'regulate' liquor prices in other states." *Id.* at 1359.

The Sixth Circuit answered that question in the negative. The court found that Tennessee's affirmation statute is "very different" from the New York law condemned in *Brown-Forman* in that a supplier may alter its prices, as it chooses, in wholesale liquor transactions in other states without first having to seek the approval of the Tennessee Alcoholic Beverage Commission. *Id.* Moreover, the Sixth

Circuit emphasized that under this Court's *Seagram* decision, which was not overruled in *Brown-Forman*, a state "may constitutionally insist that liquor prices to domestic wholesalers . . . be as low as prices offered elsewhere in the country.' " *Id.* at 1360, *quoting from Seagram*, 384 U.S. at 42-43. The Sixth Circuit held that this and nothing more "is what Tennessee has done in the statute before us." *Id.* In fact, the court concluded that § 57-3-202(e), on its face, "seems calculated to affect interstate commerce less drastically than the statute upheld in *Seagram*." *Id.* at 1361.

The Sixth Circuit noted the recent decision of the Second Circuit Court of Appeals in *The Beer Institute v. Healy*, 849 F.2d 753 (2nd Cir. 1988), *prob. juris. noted*, Nos. 88-449, 88-573 (U.S. Nov. 14, 1988) ("*Healy II*"), wherein the Second Circuit refused to " '*extend* the *Seagram* precedent'" to sustain Connecticut's beer price affirmation law. *Tennessee Alcoholic Beverage Comm'n*, 860 F.2d at 1361, *quoting from Healy II*, 849 F.2d at 760-61. The Sixth Circuit found that § 57-3-202(e) contrasted with Connecticut's affirmation law in that it "exercises no control over out-of-state prices; it simply requires that a distiller set its Tennessee prices at the lowest levels it chooses to set in other states." 860 F.2d at 1361. Finally, the court concluded that Tennessee's affirmation law, on its face, operates even-handedly, and as such, is neither discriminatory nor protectionist. *Id.* at 1362-63.

REASONS FOR DENYING THE WRIT

I.

The Sixth Circuit's Decision That Tennessee's Affirmation Law Does Not Violate The Commerce Clause Is Consistent With The Principles And Reasoning Of This Court's Commerce Clause/ Twenty-first Amendment Decisions.

Tennessee's alcoholic beverage price affirmation law, Tenn. Code Ann. § 57-3-202(e), does not control prices in wholesale liquor transactions in other states, and thus, does not directly regulate interstate commerce. Both before and after a supplier of alcoholic beverages has made its sale to a Tennessee wholesaler, the supplier is free to raise or lower its prices, as it chooses, in wholesale liquor transactions in other states. Tennessee's law does impose a general requirement of equally low prices at the time of sale to a Tennessee wholesaler. But if real competitive advantages are present, such as cost savings or quantity purchases, then lower prices to non-Tennessee wholesalers, even at the time of sale to Tennessee wholesalers, are both possible and permissible under Tennessee's law.

In *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 284 U.S. 35 (1966), this Court considered a facial Commerce Clause challenge to the State of New York's original liquor price affirmation statute. That law was "retrospective" in effect, requiring suppliers to affirm that their prices to New York wholesalers were no higher than their wholesale prices in other states during the month immediately preceeding the suppliers' sales in New York. In concluding that such a requirement did not run afoul of the dormant Commerce Clause, the Court stated that

"[t]he mere fact that [the statute] is geared to appellant's pricing policies in other states is not sufficient to invalidate the statute. As part of its regulatory scheme for the sale of liquor, New York may constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country." *Seagram*, 384 U.S. at 42-43.

Twenty years later, in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986), this Court struck down the New York liquor price affirmation statute then in effect, as a direct regulation of interstate commerce. The statute at issue in *Brown-Forman* was the successor to New York's original law addressing liquor price affirmation, the facial validity of which was upheld in *Seagram*. The *Seagram* decision was not overruled in *Brown-Forman*. *See* 476 U.S. at 584, n. 6.

The law struck down in *Brown-Forman* required all distillers of alcoholic beverages to post a price schedule, before the 25th day of each month, listing their wholesale prices in New York, to be effective the second following month. At the time the schedules were filed, the distillers were also required to file an affirmation that their posted prices for New York would be no higher than the lowest prices at which the distillers would sell liquor, during the effective month, to wholesalers in any other state. 476 U.S. at 575-76.

In analyzing the effect of these provisions on interstate commerce, this Court noted that the New York statute was not materially different from a Connecticut beer price affirmation statute struck down as a direct regulation of interstate commerce by the Second Circuit

Court of Appeals, and summarily affirmed by the Court, in *United States Brewers Association v. Healy*, 692 F.2d 275 (2nd Cir. 1982), *summarily aff'd*, 464 U.S. 909 (1983) (*Healy I*).[2] New York's law, like Connecticut's, was "prospective" in its operation. Once a supplier had posted its prices in New York, the supplier was not free to lower its prices in wholesale transactions in other states during the effective month. The only way in which the supplier could lower its prices in other states was with the approval of the New York State Liquor Authority. 476 U.S. at 581-82. As a result, New York's prospective affirmation statute operated to control prices set in wholesale transactions in other states in violation of the Commerce Clause. As held by this Court, "[f]orcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce." 476 U.S. at 582 (citations omitted).

Tennessee's affirmation statute, Tenn. Code Ann. § 57-3-202(e), is materially different from the prospective New York affirmation law struck down by the Court in *Brown-Forman*. Tennessee's affirmation statute is neither prospective nor retrospective in its operation, but rather

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[2] In addition to the decisions in *Seagram* and *Brown-Forman*, and the summary affirmance in *Healy I*, the jurisprudence of this Court in the area of price affirmation practices includes the Court's denial, in 1973 and again in 1985, of motions filed by the Commonwealth of Pennsylvania asking the court to exercise its original jurisdiction to hear Pennsylvania's complaint that all state liquor affirmation practices are unconstitutional. *See Commonwealth of Pennsylvania v. State of Alabama*, No. 101 Original (June 17, 1985); *Pennsylvania v. New York*, 410 U.S. 978, *reh. den.*, 411 U.S. 977 (1973). In both of these cases, the Court's decision was without opinion.

uses a "contemporaneous" time period as the reference point for the lowest or affirmed price. Under Tennessee's contemporaneous law, a supplier must affirm that its prices, at the time of its sale to a Tennessee wholesaler, are no higher than the supplier's prices elsewhere at that time.

Tennessee's contemporaneous statute focuses on present wholesale transactions, not future ones. *See Healy I*, 692 F.2d at 282 (Connecticut's prospective affirmation law "is geared to the future"). Both before and after a supplier has made its sale to a Tennessee wholesaler, the supplier is free to raise or lower its prices, as it chooses, in wholesale liquor transactions in other states. Unlike the New York law condemned in *Brown-Forman*, the supplier does not have to "seek the approval of the [Tennessee Alcoholic Beverage Commission] before it may lower its price for the same item in other States." *Brown-Forman*, 476 U.S. at 583.

Tennessee's affirmation law clearly falls within the ambit of permissable liquor regulation under Tennessee's Twenty-first Amendment powers, as defined by the *Seagram* decision. As the Court instructed in that case, a state "may constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country." *Seagram*, 384 U.S. at 42-43. As the Sixth Circuit recognized, this is all that Tennessee's affirmation law requires. *Tennessee Alcoholic Beverage Comm'n*, 860 F.2d at 1360. Whenever petitioner, or any other distiller deals with a Tennessee wholesaler, it must offer to that wholesaler a price not lower, but *equally* low to the price it is offering wholesalers in other states at that time. Tennessee's law certainly impacts interstate

commerce no more than the law sustained by this Court in *Seagram*.

In fact, the Sixth Circuit acknowledged that Tennessee's contemporaneous statute actually "seems calculated" to have less of an impact on interstate commerce than the statute upheld in *Seagram*. *Id.* at 1361. Whereas New York's retrospective law was geared to a supplier's wholesale liquor transactions in other states occurring throughout the month preceeding the supplier's sale to a New York wholesaler, § 57-3-202(e) is geared *only* to those transactions in other states occurring at the very time of a supplier's sale to a Tennessee wholesaler.

Moreover, whatever *de minimus* effects on interstate commerce may result from Tennessee's contemporaneous affirmation requirement, those effects are further mitigated by other aspects of Tennessee's alcoholic beverage laws. Tennessee does not require price posting, unlike New York, where price posting provisions were interrelated to the affirmation laws at issue in both *Seagram* and *Brown-Forman*. Tennessee's affirmation law is further distinguished from the New York statutes considered in those cases in its definition of the affirmed "price." Tenn. Code Ann. § 57-3-202(e)(3) defines "price" as the:

> Platform price at the distillery and shall not include price differentials based on transportation costs, containers or other costs not directly related to the quality and proof of the product concerned. Quantity discount prices for liquors sold to monopoly states or elsewhere shall not be considered to be violation of the manufacturer's, distiller's, rectifier's, factor's, broker's, or vintner's affirmation if such discount prices are also offered to Tennessee wholesalers for purchases in the same quantities.

Under Tennessee's statute, a supplier may charge a lower price in other states, even at the time of its sale to a Tennessee wholesaler, if such price results from differences in cost, or from discounts based upon quantity purchases.

The definition of "price" in Tennessee's affirmation law differs dramatically from the "price" definitions in the original New York affirmation law upheld in *Seagram*, and the successor affirmation law struck down in *Brown-Forman*. Both New York statutes required the lowest or affirmed "price" to reflect *all* discounts offered by a supplier to any out-of-state wholesalers. *Brown-Forman*, 476 U.S. at 577, n. 4; *Seagram*, 384 U.S. at 41; see also *Healy I*, 692 F.2d at 277. In fact, the *Brown-Forman* case began with an administrative action against the distiller, because Brown-Forman was prohibited from offering its 77-17 promotional allowance to wholesalers in New York, yet the definition of "price" in New York's affirmation law required that the 77-17 allowance offered by Brown-Forman to wholesalers in other states be reflected in the New York affirmed price. As this Court aptly observed:

> By defining the "effective price" of liquor differently from other States, New York can effectively force appellant to abandon its promotional allowance program in States in which that program is legal, or force those other States to alter their own regulatory schemes in order to permit appellant to lower its New York prices without violating the affirmation laws of those States. Thus New York has "project[ed] its legislation" into other states, and directly regulated commerce therein, in violation of *Seelig*, *supra*.

Id. at 2087 (footnote omitted).

As the foregoing illustrates, the Sixth Circuit correctly concluded that Tennessee's affirmation law does not operate, either on its face or in practical effect, to *control* prices in wholesale liquor transactions in other states, and as such, does not directly regulate interstate commerce. The Sixth Circuit was also correct in its conclusion that § 57-3-202(e) does not discriminate against interstate commerce.

As this Court noted in *CTS Corp. v. Dynamics Corp. of America*, 107 S.Ct. 1637, 1648 (1987) (citations omitted), "[t]he principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce." In this regard, Tennessee's statute operates even-handedly, neither favoring in-state suppliers such as petitioner, nor disfavoring suppliers out-of-state.[3] In *Brown-Forman*, this Court stated that, "[w]hile a State may seek low prices for its consumers, it may not insist that producers or consumers in other States surrender whatever competitive advantages they may possess. *Baldwin v.*

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[3] The Sixth Circuit noted that Tennessee's equally low price affirmation requirement may have the effect of increasing the cost of doing business for suppliers selling in Tennessee. *Tennessee Alcoholic Beverage Comm'n*, 860 F.2d at 1358-59. Although, as the court recognized, the record does not establish that Tennessee's statute has had that effect on petitioner's operations, even if § 57-3-202(e) does raise a supplier's cost of doing business in Tennessee by requiring equally low prices to domestic wholesalers, any increased costs impact even-handedly on both in-state and out-of-state suppliers. As a result, there is no discrimination against interstate commerce. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 (1978).

G.A.F. Seelig, Inc., 294 U.S. 511, 528 (1935); *Schwegmann Brothers Giant Super Markets v. Louisiana Milk Comm'n*, 365 F.Supp. 1144 (MD La. 1973), *aff'd*, 416 U.S. 922 (1976)." 476 U.S. at 580.

In challenging § 57-3-202(e), petitioner failed to present evidence identifying any real competitive advantages that either wholesalers or consumers in other states have been forced to surrender as a result of Tennessee's affirmation law. In the *Seelig* and *Schwegmann* cases cited by the Court, actual competitive advantages were present. In those cases, producers in other states were able to produce the items in question at a lower cost than producers in the regulating states, and because of this cost advantage, could sell the product more cheaply. *See Seelig*, 294 U.S. at 528; *Schwegmann*, 365 F.Supp. at 1153.

A lower price that is a result of savings in cost is a true competitive advantage, and one that is specifically preserved in Tennessee's affirmation law. Under § 57-3-202(e)(3), price variations based on differences in cost are an express exception to Tennessee's requirement of an equally low price for its wholesalers. Thus, if it costs petitioner, or any other distiller, less to sell to wholesalers in other states than to wholesalers in Tennessee, such a cost savings may be reflected by a lower price to the out-of-state wholesalers without violating Tennessee's law.

II.

The Sixth Circuit's Decision That Tennessee's Affirmation Law Does Not Contravene The Commerce Clause Is Not In Conflict With The Second Circuit's Decision In *Healy II*.

On March 28, 1989, this Court will hear oral argument on the constitutionality of the State of Connecticut's beer price affirmation statute in *The Beer Institute v. Healy*, 849 F.2d 757 (2nd Cir. 1988), *prob. juris. noted*, Nos. 88-449, 88-513 (U.S. Nov. 14, 1988) ("*Healy II*"). Should this Court decide not to deny Brown-Forman's petition for a writ of certiorari, the Court's consideration of the issues raised by *Healy II* should not summarily preclude consideration of the issues presented by this case regarding Tennessee's affirmation statute.

The Sixth Circuit's decision to uphold Tennessee's affirmation statute does not conflict with the Second Circuit's decision to strike down Connecticut's affirmation law. In sustaining § 57-3-202(e), the Sixth Circuit relied upon this Court's *Seagram* decision. In fact, the appeals court recognized that Tennessee's affirmation law seemed "to affect interstate commerce less drastically than the statute that was upheld in *Seagram*." *Tennessee Alcoholic Beverage Comm'n.*, 860 F.2d at 1361; *see also* 860 F.2d at 1360 ("The New York statute [in *Seagram*] was thus more restrictive than the Tennessee statute"). In ruling on Tennessee's affirmation statute, the Sixth Circuit reviewed the Second Circuit's *Healy I* and *Healy II* decisions. The court concluded that § 57-3-202(e) contrasted with Connecticut's affirmation law, because it does not control out-of-state prices, and requires at most that a supplier set its

Tennessee prices at the lowest level it chooses to set in other states. *Id.* at 1361.

The Second Circuit, in concluding that Connecticut's affirmation law violated the Commerce Clause, did not ignore the *Seagram* decision. To the contrary, the Second Circuit held that it was declining to "*extend* the *Seagram* precedent to validate a simultaneous affirmation provision that by its purposeful interaction with border state regulatory schemes, operates to control prices beyond its borders." *Healy II*, 849 F.2d at 760-61 (emphasis in original). The Second Circuit did not reject its earlier statement from its *Healy I* decision regarding *Seagram*, whereby the court had stated, *in dicta*, that *Seagram* "might well validate" affirmation regulation which required " 'simply that a brewer set its Connecticut prices at the lowest level it chooses to set in surrounding states.' " *Id.* at 760, *quoting from United States Brewers Ass'n v. Healy*, 692 F.2d 275, 283-84 (2nd Cir. 1982) (*Healy I*).

The Second Circuit concluded that Connecticut's affirmation provisions regulated beer prices outside the state in two ways. First, Connecticut had specifically chosen to regulate beer prices "*in reference to* the regulated prices in the border states. . . ." *Healy II*, 849 F.2d at 758 (emphasis in original). The "purposeful interaction" between the price posting/price regulation laws of the border states with Connecticut's price affirmation/price posting provisions operated to set beer prices in the border states. *Id.* at 760-61. Second, Connecticut's affirmation law also regulated beer prices outside Connecticut by effectively preventing the brewers' use of volume discounts to wholesalers. Connecticut's affirmation law defined the affirmed price to include volume discounts

offered to wholesalers in other states. However, Connecticut prohibited brewers from offering volume discounts to its wholesalers. The effect of this was to restrict a brewer's ability to offer volume discounts to wholesalers in the border states as such discounts would have to be reflected in the Connecticut affirmed price, even though such discounts could not be offered in that state. *Healy II*, 849 F.2d at 760. By defining the affirmed price in this way, Connecticut's affirmation law has the same effect as the New York law condemned in *Brown-Forman*, which defined the affirmed price to include the 77-17 promotional allowance Brown-Forman offered to wholesalers outside of New York, but which could not be offered to New York wholesalers. *See Brown-Forman*, 476 U.S. at 583-84.

In contrast, Tennessee's affirmation law does not operate in connection with any price posting provisions; Tennessee has none. Tennessee's affirmation statute, unlike Connecticut's, is not designed to "purposefully interact" with the liquor regulatory laws of any state. Quite simply, all Tennessee's affirmation law requires is that whenever petitioner, or any other distiller, deals with a Tennessee wholesaler, it must offer to that wholesaler a "platform price" not lower, but equally low to the platform price it is offering wholesalers in other states at that time. Moreover, Tennessee's law, differing from the Connecticut law struck down in *Healy II*, does not restrict a supplier's ability to vary its price through offers of volume discounts to wholesalers outside of Tennessee. In fact, Tennesseee has specifically defined the affirmed price to exclude any price differentials resulting from equally offered discounts for quantity purchases. As a

result, a supplier may charge a lower price in other states, even at the time of its sale to a Tennessee wholesaler, if such price results from discounts based upon quantity purchases.

III.

The Basic Principle Of *Seagram* That A State Exercising Its Twenty-first Amendment Powers May Constitutionally Insist On Equally Low Liquor Prices Should Be Reaffirmed By Denying The Writ.

Brown-Forman, in its petition for a writ of certiorari, asserts that the Sixth Circuit's decision sustaining Tennessee's affirmation statute highlights the need for the Court to address the current viability or applicability of the *Seagram* decision. The basic principle of *Seagram*, that a state, in the exercise of its Twenty-first Amendment powers, "may constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country" should be reaffirmed by this Court. *See Seagram*, 384 U.S. at 42-43. As the Sixth Circuit aptly noted, "[w]hatever the effect on interstate commerce of a state statute prohibiting sales of liquor at discriminatory prices, it could hardly be more direct or profound than the effect of prohibiting sales of liquor altogether." *Tennessee Alcoholic Beverage Comm'n.*, 860 F.2d at 1357.

If the basic principle of *Seagram* is not sustained, and the Court should rule that all affirmation statutes impermissibly interfere with interstate commerce in violation of the Commerce Clause, such a decision would impact inequitably upon the states. Such a decision would not inhibit the monopoly or control states' use of the "Des

Moines Warranty" affirmation provisions in their contracts with suppliers.

Where a state is a participant in a market, rather than a regulator thereof, this Court has held that it is not subject to the dormant or negative aspect of the Commerce Clause. *See South Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 93 (1984) (Opinion of White, J.); *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 206-08 (1983); *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-37 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 809-10 (1976). It seems obvious that the control states, as wholesale purchasers of alcoholic beverages, are participants in that market. Under the "market participant" doctrine, the price affirmation provisions imposed by the control states in their purchase contracts with liquor suppliers would be exempt from scrutiny under the Commerce Clause, and thus, would be unaffected by a decision to overrule *Seagram*.

The basic principle of *Seagram* that a state, in exercising its Twenty-first Amendment powers, may constitutionally insist on equally low liquor prices should be reaffirmed by the Court by denying petitioner a writ of certiorari. If the Court should conclude, however, that a reexamination of *Seagram* specifically, and of affirmation laws generally, is needed, then as the Sixth Circuit noted, this would "be a good case in which to do it," because Tennessee's affirmation statute "seems calculated to affect interstate commerce less drastically than the statute that was upheld in *Seagram*." *Tennessee Alcoholic Beverage Comm'n*, 860 F.2d at 1361.

CONCLUSION

For these reasons, the Commission respectfully requests that Brown-Forman's petition for a writ of certiorari be denied.

Respectfully submitted,

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